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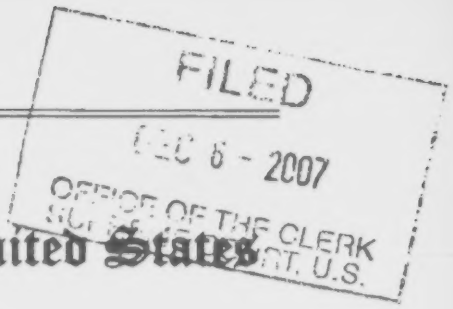

In The
Supreme Court of the United States

JOHN CARLO, INC.,

Petitioner,

v.

SECRETARY OF LABOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

BRIEF OF STEEL ERECTORS ASSOCIATION OF AMERICA, INC., UNDERGROUND UTILITY CONTRACTORS OF FLORIDA, INC., AND FLORIDA A.G.C. COUNCIL, INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*

Amici curiae, Steel Erectors Association of America, Inc. ("SEAA"), Underground Utility Contractors of Florida, Inc. ("UUCF") and Florida A.G.C. Council, Inc. ("FAGC"), respectfully submit this brief in support of petitioner, John Carlo, Inc. ("JCI"),[1] and urge the Court to reverse the decision of the United States Court of Appeals for the Eleventh Circuit, a decision that expands a decade-long rift among the circuits regarding the proof required to demonstrate an employer's serious or willful violation of the Occupational Safety and Health Act of 1970 ("OSH Act" or the "Act"), 29 U.S.C. §§ 651, *et seq.*

SEAA is the oldest and largest trade association representing structural steel erectors in the United States. SEAA has nearly five hundred contractor and

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[1] Pursuant to Rule 37.2(a) of the Rules of the Supreme Court of the United States, *amici curiae* have timely provided notice of their intent to file this brief in support of Petitioner to counsel for Petitioner and Respondent. Counsel for both Petitioner and Respondent have furnished their written consent to the filing of this brief. *Amici curiae* further represent, pursuant to this Court's Rule 37.6, that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* have made a monetary contribution to the preparation and submission of this brief. In this brief, the Respondent shall be referred to as the "Secretary," and the Occupational Safety and Health Review Commission shall be referred to as the "Commission." The Occupational Safety and Health Administration shall be referred to as "OSHA." References to the appendix of Petitioner's brief shall be referred to as "App. [page number]."

associate members performing work throughout the country. SEAA provided members and representatives to the Department of Labor's Steel Erection Negotiated Rulemaking Advisory Committee, which, in 2002, resulted in the adoption of the first OSH Act standard to arise from direct negotiations with a regulated industry. UUCF is a non-profit trade association representing over six hundred contractors and suppliers engaged in the business of building and repairing underground utilities throughout the State of Florida. FAGC is an organization comprised of three Florida chapters of the Associated General Contractors of America, the preeminent nationwide trade association for construction contractors. FAGC represents over five hundred members and general contractors conducting construction work throughout Florida.

REASONS FOR GRANTING THE WRIT

The precise dispute for which review is sought is perhaps best understood by first resolving what it is not. When framed properly, the issue would not, as has been suggested by the Secretary to the Eleventh Circuit, concern a company's "responsibility" for the intentional acts of a foreman, which led to the tragic death of his fellow employee. The common law of tort, the statutory remedies of worker's compensation statutes, and, when appropriate, criminal penalties all provide ample means of obtaining individual and societal redress against a company, to ensure an

employer bears its appropriate responsibility for injuries. Rather, the issue Petitioner and *amici curiae* request this Court to consider is whether an employee supervisor who disregards his training, his authority, and indeed, his express instructions from his employer, can be said to create a company-sanctioned safety hazard. To what extent can the doctrine of *respondeat superior* be invoked against an employer in a regulatory proceeding where the supervisor acts contrary to his instructions? Are the goals of the OSH Act in any way advanced by instantaneously imputing knowledge from a "rogue" foreman in the field to his entire company miles away? As will be shown below, they are actually undermined.

I. The OSH Act's goals and the duties it imposes were meant to be realistic and achievable.

Congress struck a careful balance when it enacted the OSH Act. Recognizing the inherent distinction between employers and employees in the endeavor to create safer workplaces, Congress found that their respective responsibilities were indeed "separate" ones. 29 U.S.C. § 651(b)(2). Thus, "[i]t was not the legislative purpose to impose absolute liability on employers for safety violations, [] or to require safety measures beyond those that are reasonable and feasible." *New York State Elec. & Gas Corp. v. Sec. of Labor*, 88 F.3d 98, 103 (2d Cir. 1996) (internal citations omitted). Although the Act certainly could have been structured to make clear that any violation, in any

circumstance, constituted a punishable infraction, Congress limited an employer's duty under the Act to be an "achievable" one, to require "elimination only of preventable hazards." *W.G. Yates & Sons Construction Co., Inc. v. OSHRC*, 459 F.3d 604, 606 (5th Cir. 2006). In this balance of fostering safer worksites through reasonable, achievable, realistic goals, Congress (and the majority of courts interpreting the Act) recognized the impossibility of ensuring perfect employee compliance with OSH Act safety regulations through regulatory sanctions.

The case *sub judice* poses the important issue of whether it is a reasonable or achievable goal for every employer to know what every foreman or supervisor perceives on every work site at any given moment, and to then somehow ensure that every such foreman and supervisor will indeed follow every safety instruction they have ever been given. By instantaneously imputing a foreman's knowledge of his own, willful wrongdoing to his employer, the Secretary has now placed upon employers this very goal. *Amici curiae* submit this is an impossible standard to achieve. The legal mechanism through which the Secretary has imposed this burden – the theory of "agency" or *respondeat superior* – has been both misdirected and misapplied to the detriment of employers in the construction industry.

II. At present, the imputation of a foreman's knowledge of a hazardous condition he creates will fundamentally shift the burden of proof for OSH Act violations in a minority of circuits.

To prove that an employer has violated an OSH Act standard or regulation, the Secretary must prove each of the following four elements: (1) the standard is applicable; (2) the employer failed to comply with the standard; (3) employees had access to the violative condition; and, most importantly in this case (4) that the employer had knowledge or constructive knowledge of the violative condition. *New York State Elec. & Gas*, 88 F.3d at 105. Although knowledge can be proven in a variety of ways, the Secretary bears the ultimate burden of proving this "fundamental" element of its case by a preponderance of the evidence. 5 U.S.C. § 556(3); *Trinity Industries, Inc. v. OSHRC*, 206 F.3d 539, 542 (5th Cir. 2000).

The present case concerns the repercussions of one particular vista of knowledge: the knowledge of a company's supervisors. The Secretary contends that the knowledge of a supervisor or foreperson in the field concerning a safety hazard he or she creates instantly becomes the "knowledge" of the entire company, thus discharging her initial burden of proving the fourth element of an OSH Act violation. Apparently harkening to agency principles, the Sixth Circuit has adopted this reasoning, albeit without substantial explanation of why it did so. *See Danis-Shook Joint Venture XXV v. Sec. of Labor*, 319 F.3d

805, 812 (6th Cir. 2003) ("Because Wagner was a foreman and knew of his own failure to wear personal protective equipment, this failure may be imputed to Danis-Shook."). Thus, in cases where a rogue supervisor ignores explicit safety instructions from his employer, the Secretary's burden of proving her *prima facie* case of a violation becomes a foregone conclusion. The first three elements will be established by the occurrence of the event. The final element of the Secretary's case, the employer's knowledge, will likewise be relegated to a self-proven analytical exercise simply by engaging in the legal fiction of *respondeat superior*: the moment the recalcitrant supervisor perceives his own hazard, he binds his employer to the very conduct his employer attempted to prevent.

There can be no doubt that the Eleventh Circuit adopted the same principle in the case *sub judice*. Although no evidence was presented regarding Petitioner's management's awareness of the twenty to thirty minute trench hazard that led to a worker's death, the Commission affirmed a "serious" and "willful" violation of 29 C.F.R. § 1926.652(a)(1) on the part of JCI, finding that JCI "[t]hrough Cox [a supervisor] and Jacobs [a foreman], was actually aware, at the time of the violative act, that the act was unlawful." App. 29. The Eleventh Circuit then, in turn, affirmed this legal fiat: "The ALJ imputed Jacobs' actual knowledge of the violation to JCI." App. 4.

These decisions represent an expansion in the scope of punishable conduct under the OSH Act far beyond what was authorized by Congress. Taken

together, the Secretary has effectively crafted precedent that shifts the burden of proof entirely from the regulating agency to the regulated employer any time an employee "foreman" knowingly engages in unsafe conduct. Those in the business of construction are left to prove their innocence from a presumption of guilt whenever their field supervisors engage in dangerous activities.

The Secretary argued below that an employer can nevertheless avail itself of protection from a supervisor's misconduct by asserting the employee's misconduct as an affirmative defense.[2] Completely shifting the burden of proof from the regulating agency to the regulated employer without legislative amendment, substantive justification (or, indeed, any explanation) is troubling enough for a regulatory statute that carries the potential for substantial fines and even imprisonment.[3] It is all the more so where,

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[2] The employee misconduct defense requires the employer to prove the following elements: (1) establishment of work rules designed to prevent the violation; (2) adequate communication of those rules to employees; (3) that the employer has taken steps to discover violations; and (4) the employer has effectively enforced the rules when violations have been discovered. *W.G. Yates & Sons Const. Co. Inc. v. OSHRC*, 459 F.3d 604, 609 n.7 (5th Cir. 2006); *Frank Lill & Son, Inc. v. Sec. of Labor*, 362 F.3d 840, 845 (D.C. Cir. 2004).

[3] 29 U.S.C. § 666(e) ("Any employer who willfully violates any standard, rule, or order . . . or of any regulations prescribed pursuant to this chapter, and that violation caused death to any employee, shall, upon conviction, be punished by a fine of not

(Continued on following page)

as in the Sixth and Eleventh Circuits, the "defense" is rendered illusory by applying the doctrine of *respondeat superior*. If a foreman employee willfully creates a hazard and his knowledge of the hazard he creates is instantaneously attributed to his employer, the employer is trapped in a "Catch-22" in the Sixth and Eleventh Circuits: the very same employee misconduct it must disavow itself of in order to prove effective enforcement of its safety rules will be treated as irrefutable evidence of the employer's failed enforcement. Simply put, the defense can never be established.

In contrast, the Third, Fourth, Fifth, and Tenth Circuits correctly limit a foreman's perception of his own unsafe conduct to an item of evidence, something to be considered in the broader context of the employer's safety program. *W.G. Yates & Sons Const. Co. Inc. v. OSHRC*, 459 F.3d 604, 608-609 (5th Cir. 2006); *L.R. Wilson and Sons, Inc. v. OSHRC*, 134 F.3d 1235, 1240 (4th Cir. 1998); *Pennsylvania Power & Light Co. v. OSHRC*, 737 F.2d 350, 357 (3d Cir. 1982); *Mountain States Telephone and Telegraph Co. v. OSHRC*, 623 F.2d 155, 158 (10th Cir. 1980). Thus, a foreman's perception of a hazard he creates, by itself, does not discharge the knowledge element of the Secretary's *prima facie* case:

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more than $10,000 or by imprisonment for not more than six months, or by both.").

> [a] supervisor's knowledge of his own malfeasance is *not* imputable to the employer where the employer's safety policy, training, and discipline are sufficient to make the supervisor's conduct in violation of the policy unforeseeable. As with each element required to establish a violation, employer knowledge must be established by the Secretary. . . . Consequently, the Secretary, not Yates [the employer], bears the burden to establish that the supervisor's conduct was foreseeable.

W.G. Yates, 459 F.3d at 608-609 (internal citations omitted).

Only after the Secretary has actually discharged her burden of persuasion on all of the elements of a violation would the employer need to establish an employee misconduct defense to avoid sanctions. For to hold otherwise would impose a burden on the employer "of defending a violation that had not been established." *Id.* at 609. This view represents a far more reasoned and pragmatic approach to furthering the Act's goals, while protecting employers from conduct they could never reasonably be expected to prevent. These courts, like Congress when it enacted the OSH Act, recognize that an employer cannot exert complete control over every action of an employee in the field. As such, it is wholly unreasonable to charge employers with their employees' knowledge when their employees disregard their express instructions.

III. This Court should review the Sixth and Eleventh Circuits' improper application of agency principles to OSH Act violations.

A. Applying *respondeat superior* liability to employers contravenes the OSH Act's definition of "employer."

It must be noted at the outset that the Eleventh and Sixth Circuits' ascription of OSH Act liability through the subjective perceptions of an employer's agents finds no support in the text of the Act itself. Quite the contrary, the Act defines an "employer" to mean: "[a] person engaged in a business affecting commerce who has employees, but does not include the United States (not including the United States Postal Service) or any State or political subdivision of a State." 29 U.S.C. § 652. Notably absent from this definition is any mention of the "person's" agents. This omission cannot be construed as an unintentional oversight. When it deems appropriate to extend the ambit of a statute to include one's agents, Congress has made that intention perfectly clear in other regulatory statutes. *See* 42 U.S.C. § 2000(e)(b) (Title VII definition of "employer" includes "a person engaged in an industry affecting commerce . . . and any agent of such a person . . . "); 42 U.S.C. § 12111(5)(A) (definition of "employer" under Americans with Disability Act includes "any agent"); 29 U.S.C. § 630(b) (under Age Discrimination in Employment Act, "The term [employer] also means (1) any agent of such a person . . . ").

Of course, neither the *Danis-Shook* nor the *JCI* courts premised their imputation of a supervisor's knowledge upon explicit language from the Act. Assuming, as one must, that the basis was gleaned from the common law, there as well, the Courts' engrafting of agency principles was fundamentally flawed – particularly in the construction industry.

B. The blind application of *respondeat superior* to OSH Act violations sets an impossible standard with which employers would have to comply.

The touchstone of the Sixth and Eleventh Circuit's holdings appear to rest upon the assumption that in common law, an employer is liable for the acts of its employees. While true in its proper context, the incursion of *respondeat superior* into OSH Act regulatory jurisprudence is far from a seamless fit. The primary purpose underlying *respondeat superior* liability was to ensure that tort victims injured by a corporation's employee had an adequate means of obtaining compensation from a party that could actually pay a judgment. *See O'Hara v. Teamsters Union Local No. 856*, 151 F.3d 1152, 1158 (9th Cir. 1999). While the OSH Act contains an exhaustive list of the goals it seeks to advance, restitution for tort victims is not among them. 29 U.S.C. § 651(b)(2). Nor would such a goal even be appropriate for a statute such as the Act. *Cf. Faragher v. City of Boca Raton*, 524 U.S. 775, 805-806 (1998) (noting the "primary objective" of Title VII, "like that of any statute meant

to influence primary conduct, is not to provide redress but to avoid harm.").

When framed in its regulatory context, the automatic attribution of knowledge from foreman to employer becomes especially problematic in the construction industry. The experience of *amici curiae* is that construction employees frequently rely upon informal directions from their senior co-workers, journeymen, or tradesmen in performing their respective job duties, none of whom may carry any actual supervisory authority from the employer. Often, more experienced laborers simply take upon themselves the task of guiding novice workers without necessarily informing a designated supervisor or manager. Even among authorized supervisor employees, the degree of supervision and oversight with which they are actually entrusted may vary tremendously between projects and job sites.

Whatever distinction may lie between a "supervisor," a "foreman," or workers and laborers of varying degrees of seniority, it is a distinction that is, at best, blurred. The Commission's own precedent recognizes as much – but utilizes this less than clear distinction to expand, rather than restrict, regulatory liability. *E.g., Sec. of Labor v. Rawson Contractors, Inc.*, 2000 O.S.H.D. (CCH) P 32096, *8 (O.S.H.R.C.A.L.J. 2000) (union member foreman with no authority to hire or fire workers imputed knowledge of hazardous trench to management of employer); *Sec. of Labor v. Propellex Corp.*, 1999 O.S.H.D. (CCH) P 31792, *3 (O.S.H.R.C. 1999) (knowledge of dangerous fire near explosive

materials imputed to company through a crew "lead-person" with no authority to discipline, hire, or fire employees, but who earned $1.00 more per hour than her fellow employees); *Sec. of Labor v. A.P. O'Horo Co., Inc.*, 1991 O.S.H.D. (CCH) P 29223 (O.S.H.R.C. 1991) (laborer designated as temporary crew foreman imputed knowledge to employer of unsafe trench); *Sec. of Labor v. Paul Betty d/b/a Betty Brothers*, 1981 O.S.H.D. (CCH) P 25219 (O.S.H.R.C. 1981) (plasterer who merely stated he was the "foreman" of a single laborer working without a scaffold charged his employer with knowledge of the violation). One is left to wonder what remains of the employer's chosen designation of supervisory employees if the Commission construes any and every veneer of authority to create supervisor "agents" from ordinary workers.[4] This expansion of supervisory-based liability is illustrated in the case at bar: the foreman and project superintendent through whom the Commission purportedly imputed knowledge of the unsafe trench to JCI were two individuals among over a thousand JCI employees, who

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[4] It should also be noted that the Sixth and Eleventh Circuits, while acknowledging the supervisory status of the employee agent(s), did not limit their application of *respondeat superior* correspondingly. If a supervisor's knowledge of a hazardous condition is properly imputed to his employer simply because the supervisor is "an agent" of that employer, then it would stand to reason that every employee's knowledge could likewise be imputed under precisely the same analysis. Such an application could not be described as anything other than strict liability for an employer.

were themselves subordinate to JCI's general superintendent. App. 40, 42.

Even beyond the instance of the rogue supervisor circumventing his express directions, this expansion of agent-based liability creates confusion for construction employers who happen to do business in multiple jurisdictions. *Amicus curiae* SEAA has experienced varying and shifting interpretations of safety standards by OSHA depending on the location of a worksite and the compliance officer assigned to a particular geographic area. Under these circumstances, the perception a supervisor could impute to his or her employer would turn on whether a condition constituted a hazard in one jurisdiction, but not necessarily another. In effect, the employer's "knowledge" of a condition on any given site would become the function of a regulatory officer's interpretation of that condition.

Most troubling of all, however, are the legal repercussions the Sixth and Eleventh Circuits' analyses necessarily create. Read closely, the Eleventh Circuit's affirmance in this case, the Sixth Circuit's holding in *Danis-Shook*, and the Commission's holdings for the past two decades not only fail to account for the pragmatic realities of construction work, they have stretched the concept of "constructive knowledge" of a corporation – a standard akin to negligence – squarely into the realm of absolute, strict liability. Under these rulings and the Commission's own precedent, any worker who directs a fellow employee to move a pile of bricks, nail a board, or dig a hole – or

simply happens to earn more money than his co-worker – instantly becomes the "agent" of the employer's entire safety program. What these authorities illustrate is that employers can have the efficacy of their safety programs adjudicated (and correspondingly sanctioned) based upon nothing more than the *apparent* authority of any one of their employees on a worksite.[5] In so doing, two circuit courts have amalgamated a "strict liability" agency principle into a regulatory act that purposely avoided strict liability as a standard of duty.

The Seventh Circuit explored just such a conflation in a Title IX claim in *Smith v. Metropolitan School District Perry Township*, 128 F.3d 1014 (7th Cir. 1997). In *Smith*, a former student sought to hold her school board and district liable for the sexual harassment of her high school swim team's coach. *Id.* at 1017-1018, 1021. One of the plaintiff's theories of liability hinged upon the notion that the coach was the agent of the institutional defendants. *Id.* at 1022. A divided appellate court remanded the case for entry of summary judgment in favor of the defendants, and, in so holding, offered this cogent analysis:

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[5] *Cf.* RESTATEMENT (THIRD) OF THE LAW ON AGENCY § 2.03 (2006): "Apparent authority is the power held by an agent or other actor to affect a principal's legal relations with third parties when a third party reasonably believes the actor has authority to act on behalf of the principal and that belief is traceable to the principal's manifestations."

> Agency principles define the relationship between principals and their agents, as well establish rules for a principal's liability to third parties. Some of those rules create strict liability, and others create liability only for negligence. In fact, the dissent itself applies some agency principles (abuse of authority and apparent authority) which create strict liability. Thus, the choice presented is not between agency principles and strict liability, but between different agency principles, some of which result in strict liability and some of which result in liability only for negligence . . . Title IX cannot create strict liability for grant recipients [ ] . Yet certain agency applications would do just that.

Id. at 1026 n. 12.

What the Seventh Circuit recognized explicitly in *Smith* is precisely what has arisen implicitly within the Sixth and Eleventh Circuits for OSH Act violations: employers are held to strict liability for violations through the apparent authority of any "supervisor" they employ. This is truly strict liability in effect, if not in name. *Cf. New York State Elec. & Gas*, 88 F.3d at 101 ("[a]lthough the Commission's ruling did not in so many words impose absolute liability on the employer, it implicitly applied a *per se* rule of liability based on a single occurrence of unsafe conduct . . . ").

Similarly, in a Sherman Act case, Justice Rehnquist decried the expansion of corporate liability

based upon nothing more than a director's apparent authority:

> Finally, no principle of agency law was more firmly established in 1890 – or now for that matter – than that *punitive* damages are not awarded against a principal for the acts of an agent acting only with apparent authority and without any intention of benefiting the principal . . . Although an inquiry into the legislative history and the law of agency is not conclusive, it does cast serious doubt on the Court's choice of this case to promulgate a new rule of antitrust liability.

See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 589 (1982) (*dissenting*).

This case presents this Court the opportunity to correct the contours of agency liability being applied under the OSH Act, to align the text of the Act and the Secretary's burden of proof with settled jurisprudence on the law of *respondeat superior*. There are also policy implications the Court should consider as well.

C. Expanding an employer's OSH Act liability through every field supervisor and foreman it employs could undermine incentives to utilize supervisors.

The Eleventh and Sixth Circuits' holdings contravene long-standing precedent as well as the goals

the OSH Act was enacted to achieve. They also impose an impossible dilemma on contractors: construction employers must staff a level of supervision to ensure safety on their jobsites; yet, the more supervisors they employ, the greater likelihood that any hazardous condition that temporarily exists will be instantly imputed to them, thereby undercutting the Commission's view of the employer's safety record. The case before the Court illustrates this point: the hazardous trench that precipitated the accident existed for all of twenty to thirty minutes. App. 13.

Instantaneous and automatic imputation of every supervisor's misconduct to his employer will hardly generate an incentive on the part of employers to employ more supervisors. Indeed, so long as there is no demonstrable detriment to the employer's safety program, an employer may field fewer employees with supervisory roles in order to limit its potential exposure under the Act. The application of a strict liability form of agency unavoidably creates incentives such as these that could actually deter the employment of foremen and supervisors on construction worksites.

IV. This case would serve as an appropriate vehicle for the resolution of this conflict.

Judge Cardamone of the Second Circuit presciently opined in 1996 that switching the burden of proof to the employer in employee misconduct cases was "sowing seeds of doubt in a field of the law that

may already be described as a patchwork of confusion." *New York State Elec. & Gas*, 88 F.3d at 100-101. *Amici curiae* respectfully suggest the patchwork has grown only more confused in the ensuing decade following *New York State Electric*. This case poses an ideal opportunity for this Court to resolve this confusion.

The Eleventh Circuit's decision not to publish the *JCI* opinion in the instant case clearly suggests its view that imputation of a supervisor's knowledge (and shifting the burden of proof from the Secretary to an employer) is presumptively self-evident. The appellate court is not likely to retreat from this incorrect presumption absent this Court's intervention. However, a well-developed record below, coupled with the clear and succinct expression of the Eleventh Circuit's theory of agency, crystallizes the unsettled legal question for the Court to decide. The question presented to this Court raises an important and timely issue not only for the litigants, but also for all those engaged in the construction industry throughout the United States. This case is an ideal vehicle to finally resolve all of these considerations.

CONCLUSION

None of the circuit courts applying a supervisor's knowledge to his or her employer have yet engaged in a substantive analysis as to the justification for doing so. Even now, this anomaly of shifting the burden of

proof – and all of its repercussions – has yet to be rationalized by any circuit court to adopt it, beyond a rote recitation to basic principles of agency law. When explored more carefully, the principles the Sixth and Eleventh Circuit invoked turn the Act (and its settled precedent) into a strict liability regime. For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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